

FILE COPY

1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

Petitioner,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, ET AL.,
ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL MEMORANDUM

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
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vs.

Petitioner,

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON, AND FRANK G. THOMPSON, AS AND
CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA,

Respondents

PETITIONER'S SUPPLEMENTAL MEMORANDUM

on the

Application of the Spector Case

In the case of *Spector Motor Service Inc. v. Charles J. McLaughlin, Tax Commissioner*, this Court remanded the cause to the District Court with instructions that the parties obtain a determination from the State court as to the proper interpretation of the State Statute and applicable provisions of the State Constitution. The District Court and the Circuit Court of Appeals had reached divergent views as to the construction of the state statute, and the act in question had not been considered by the State courts. Before considering all the possible United States Constitutional questions that might arise from various interpreta-

tions of the State statute, this Court desired to know just what interpretation the State Court would adopt.

In the present case this Court is not called upon to decide constitutional issues, but only to determine whether the lower courts properly followed the principles established by the State Court in the case of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. 2nd 150. Petitioner has cited the case of *McLeod v. Dilworth*, 64 Sup. Ct. Rep. 1023, to show that the application of the Indiana tax to these transactions would violate the Commerce Clause, but since that point was not among the errors assigned, such discussion is merely an aid in interpreting the Indiana Statute which should be construed in such manner as to render it constitutional if possible.

This case then is purely one based upon diversity of citizenship so far as this proceeding is concerned, and we are not asking this Court to decide Constitutional questions which might never arise. The basic reason given for the action taken in the *Spector* case therefore is not present here.

Further, petitioner is not asking for a construction of a new State Statute that has not been considered by Indiana State Courts. A great multitude of questions have been raised and decided in the more than a score of decisions already handed down by the Indiana Supreme Court, involving the Gross Income Tax Act. The nature of the tax was determined in *J. D. Adams Manufacturing Co. v. Storen*, 212 Ind. 343, 7 N. E. 2nd 941, which definition was used by this Court in reaching decisions in the cases of:

J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307;

Treasury v. Wood Preserving Corporation, 313 U. S. 62;

International Harvester Co. v. Treasury, 321 U. S. —

The State Court has spoken many times with regard to this statute, and with respect to the present controversy has said that income was not derived from "sources within the State of Indiana" by a non-resident who sold products to Indiana dealers, where delivery was made to a carrier outside the State, with reservation of title in the non-resident seller until payment of the purchase price, *Treasury v. International Harvester Co.* (1943) 47 N. E. 2nd 150.

The question presented to the District Court was whether that *principle* was applicable in this case where the contract was likewise accepted outside the State, and delivery was made to an authorized agent of the dealer outside the State, which agent assumed full responsibility for the purchase price, (R. 56), with retention of title in the non-resident seller until payment in full.

If the Federal courts are to exercise their intended function with respect to cases where jurisdiction rests on diversity of citizenship, those courts must be permitted to apply *principles* to differing sets of facts. True, the Federal Court must look to State Court decisions for those principles, but having found some principles, the Court should be permitted to exercise the customary judicial function of deciding the case. The right of a non-resident to sue in the Federal Courts becomes a dead letter if he must get a decision from the State Court in his case before the Federal Court can act.

Since the Supreme Court of Indiana has determined when income is exempt from tax because it was not derived from sources within the State, this Court should determine whether the income in the present case was derived from sources within the State to any different degree than prevailed in the *International Harvester* case. Ford did no more with respect to these Class A sales within the State

of Indiana that could be regarded as a source of income in this case, than International Harvester did with respect to the Class A sales in the case decided by the Indiana Supreme Court.

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